UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GEORGE GUINDON et al.

Plaintiffs

vs. C. A. No. 03-335-L

AMERICAN FOAM CORPORATION
et al.

Defendants

PLAINTIFF MICHELLE SPENCE'S MEMORANDUM IN SUPPORT OF HER OBJECTION TO DEFENDANT FOAMEX INTERNATIONAL, INC.'S MOTION TO DISMISS

Now comes the Plaintiff MICHELLE SPENCE, by and through counsel, and files this, her Memorandum in Support of her Objection to the motion to dismiss filed pursuant to Rule 12(b)(6) by Defendant Foamex International, Inc.

TRAVEL

This action arises from personal injuries suffered by Plaintiff Michelle Spence during a fire at the Station nightclub in West Warwick, Rhode Island on February 20,

97

2003.[1] On August 8, 2003, Plaintiff filed her complaint against numerous defendants asserting, among other claims, negligence and strict liability counts against Defendant Foamex International, Inc. (hereinafter 'Foamex').[2] Counsel for this Plaintiff has only recently been asked to take over responsibility for this case from prior counsel on Plaintiff's behalf, entering his appearance on June 3, 2004. The pending complaint against which Defendant's motion is directed was filed by prior counsel for this Plaintiff, which current counsel played no part in preparing.

By order of this court entered on March 29, 2004 discovery in all pending actions relating to the Station nightclub fire was stayed until September 1, 2004. All named defendants have refrained from filing answers or other responsive pleadings to Plaintiff's complaint save Foamex, who on April 30, 2004 filed a Motion to Dismiss under F.R.C.P. 12(b)(6). In a more recent order, this Court deferred ruling on this, and any other dispositive motions that may be filed thereafter, at least until September 1, 2004. Plaintiff offers her response herein to the arguments set forth by counsel for Foamex.

FACTS

The Station Nightclub fire is the worst tragedy in Rhode Island history. The cost in human terms, 100 dead and more than 200 injured, is without parallel. The basic facts of the Station nightclub tragedy are now well known. In June 2000, the owners of the nightclub purchased non-flame retardant flexible polyurethane foam from American

---

[1] Plaintiff Michelle Spence has also brought actions on behalf of her daughter Hailey, a minor, as her mother and next friend, for loss of consortium. (See Counts 226 and 228)

[2] See Counts 225 and 227.

Foam Corporation, (hereinafter 'American Foam') a company located in Johnston, Rhode Island, and a Defendant in this action. The foam was to be used to acoustically dampen the high volume rock music that would frequently emanate from the club. (See *Affidavit of Det. Roland J. Coutu in support of issuance of search warrant* marked *Exhibit 1* appended hereto and made a part hereof). The owners affixed the foam to the interior walls near the stage and in the drummer's alcove, exposed, where it remained until February 20, 1993, the evening of the fire.

As a concert by the rock band Great White began, sparks created by a pyrotechnic display ignited the exposed polyurethane foam in and around the stage. In a matter of seconds the nightclub was transformed into a roaring, deadly inferno. Unsuspecting concertgoers, including Michelle Spence, were enveloped in a cloud of toxic, black smoke and flames generated primarily by the burning foam, and from which many never escaped. The Plaintiff has brought a products liability claim against Foamex with respect to this non-flame retardant foam. The nature of the defects alleged include the foam's extreme flammability, the deadly toxic nature of its combustion by-products, the inadequate warnings that accompanied the sale of the product and negligence in its marketing and distribution.

Reasonable information exists to justifiably conclude that General Foam Corporation (hereinafter 'General Foam', a named defendant in *Passa v. Derderian*, Case No. CA 03-148 L) supplied flexible polyurethane foam to American Foam virtually contemporaneously with the resale of the foam to the owners of the Station.[3] (See

---

[3] Immediately after the fire, an investigation was undertaken by numerous federal, state and local agencies. During this investigation, a warrant was served upon American Foam on February 24, 2003. American Foam voluntarily produced a number of documents, including:

Return of Service marked *Exhibit 2* appended hereto and made a part hereof). In July 2001, (a year after the club owners' purchase of the foam from American Foam and a little more than year and a half before the fire), Foamex L.P., a company owned by Defendant Foamex International, "acquired" certain assets, and liabilities, of General Foam. (In a filing made with the Securities and Exchange Commission, Foamex L.P. disclosed its purchase of certain assets of General Foam Corporation, but also stated "[I]n connection with the transaction . . . [it] *also assumed certain liabilities*." (emphasis added) (S.E.C. Form 10q, filed on November 14, 2001, Accession Number: 0000912908-01-500028). (See also *Affidavit of Margaret Hebner*, ¶ 2, appended to Defendant's Memorandum filed in the matter of *Passa v. Derderian*).[4]

As the successor to General Foam, the Plaintiff alleges that Foamex is liable for Plaintiff's injuries.[5] Yet, without a single question asked in discovery, or one word of testimony uttered by anyone impacted by this tragedy, Foamex moves this court for an

---

- "2.) Polyether Foam Grade: 360000XXX Product Data Sheet prepared by General Foam dated 7-7-95." (with an "additional copy")
- "5.) Material Safety Data Sheets, prepared by General Foam for product "Flexible Polurethane (sic.) Foam" dated 1/97 consisting of eight (8) pages."

Exhibit 2 – Return of Service. See also "Purchase of foam at club is traced", Boston Globe, March 6, 2003.

[4] Both Hebner affidavits state that "Foamex International Inc. is a Delaware holding company that owns 100% of Foamex, L.P." In the affidavit filed in *Passa v. Derderian* Hebner also states "[i]n July, 2001 Foamex L.P. ("Foamex") acquired certain assets of General Foam Corporation's ("GFC") business of developing, manufacturing and selling polyurethane products."

[5] As of the date counsel entered his appearance for the Plaintiff, neither Foamex L.P., through its general partner, nor General Foam Corporation, had been sued by predecessor Plaintiff's counsel. As it is Plaintiff's intention to seek leave of this court to file an amended complaint to include these additional parties predicated upon, *inter alia*, theories of successor corporate liability, for purposes of her argument herein, Plaintiff will refer to the Defendant Foamex International, Inc., Foamex L.P. and General Foam Corporation synonymously. (See *Memorandum of Law* filed by Defendants in *Passa v. Derderian* at p. 2 where Defendants state "[b]ecause any liability of a successor would be merely derivative of any liability of GFC, for purposes of this Motion to Dismiss, Foamex and GFC appear collectively as "GFC").

order dismissing the claims brought by this Plaintiff, and many others. For the reasons set forth below, the Plaintiff prays that this Honorable Court deny the motion of Foamex, and that the Plaintiff be given her day in court.

ARGUMENT

The Plaintiff claims the product manufactured by General Foam, the predecessor of Foamex, led to the traumatic injuries for which she now seeks recompense. Moreover, the nature, magnitude, and complexity of events that form the building blocks of this fire give rise to facts that, at once, require in depth exploration and will prove the liability of Foamex for this tragedy.

I. Standard of Review

Plaintiff's complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that she can prove no set of facts in support of her claim which would entitle her to relief. (*emphasis added*); *See Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Generally, the complaint is construed favorably to the plaintiff. See *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The Plaintiff is also entitled to the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of her complaint, and those allegations must be accepted as true. See *Retail Clerks Intern. Ass'n, Local 1625, AFL-CIO v. Schermerhorn,* 373 U.S. 746, 753 n. 6, 83 S.Ct. 1461, 10 L.Ed.2d 678 (1963); See also *Cruz v. Beto,* 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). Moreover, the Plaintiff does not necessarily need to allege a particular fact if that fact can be reasonably inferred from facts properly alleged. Id.; See also *Wheeldin v. Wheeler,* 373 U.S. 647, 648, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963) (inferring fact from allegations of complaint).

II. The Defendant is not a Supplier of 'Product Components' As Defined in The Restatement (Third) of Torts § 5

The Defendant cites the Restatement (Third) of Torts § 5 (1998) entitled "*Liability of a Commercial Seller or Distributor of Product Components for Harm Caused by Products Into Which Those Components are Integrated*" which states that

> One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if:
>
> (a) the component is defective in itself, as defined in this Chapter, and the defect causes the harm; or
>
> (b) (1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and
>
> (2) the integration of the component causes the product to be defective, as defined in this Chapter; and
>
> (3) the defect in the product causes the harm.

The Defendant claims to be a bulk supplier that provides "product components" to fabricators such as American Foam, (See Defendant's Memorandum at p. 27) and attempts to define itself as "[o]ne engaged in the business of selling or otherwise distributing product components who sells or distributes a component . . ." Restatement (Third) of Torts § 5 (1998). This definition simply does not apply to the Defendant.

Defendant's reasoning fails in two critical respects. First of all, the Defendant asks this Court to accept the flawed proposition that the sale of foam in larger 'buns' to a company who then cuts it into smaller shapes and sizes transforms the Defendant into a 'bulk supplier' of 'product components' under the definition of Section 5 of the Restatement of Torts cited above. The Defendant fails to provide a plausible answer, however, to the following important question: What is the product into which the components are integrated? The answer of course is there is no product other than the foam itself. Under the facts of this case, the foam sold to American Foam was not integrated into any "other products". It was simply a matter of the larger foam 'buns' sold to American Foam being cut and shaped into smaller and more usable forms.

The Defendant would have the Court accept, by way of illustrative example, that a larger, square piece of foam was a 'component' which was 'integrated' into a 'product' after a buyer had taken the square and cut it into triangles. It is no more a 'component' part of a 'product' than when a child plunges his spoon into a bowl of 'Jello'. Under the Defendant's reasoning, the Jello Company is the 'bulk supplier', the 'Jello' is the 'component' and the 'product' is what rests on the end of the child's spoon.

Plaintiff's conclusions herein are supported and supplemented by Gordon Damant, a well-recognized expert in the field of polyurethane foam. (See *Affidavit of Gordon Damant* appended hereto and made a part hereof). Mr. Damant explains in his affidavit that "[p]olyurethane foam is never used in the physical form in which it is produced during the manufacturing process." (*Affidavit of Gordon Damant,* ¶ 7). It "is generally supplied to users in large buns" that are "always cut by either the end user, or by foam fabricators, to achieve the specific dimensions needed in the end use application." Id.[6] He goes on to say that "[c]onvoluting, or creating dimples, in foam is a common practice." Id. "Convoluting merely changes the polyurethane foam from one physical structure and dimension to another. *Performing the convoluting procedure in no way remanufactures the foam or changes any of its chemical or basic flammability properties*." (emphasis added) Id. The conclusion is that the polyurethane foam purchased by the owners of the Station from American Foam and affixed to the walls of the nightclub was no different in any way relevant to this proceeding than when it was purchased by American Foam.[7]

The Defendant's argument on this issue falters for a second and perhaps more basic reason. Assuming, arguendo, that the Defendant was a 'bulk supplier' under Section 5, the Defendant would then be liable if the "component is defective in itself" and "the defect causes harm". Restatement (Third) of Torts § 5 (1998). The Plaintiff has alleged product defect in the complaint, claiming the polyurethane foam used in the Station nightclub "was defective and unreasonably dangerous in that the foam was highly flammable and toxic . . ." and further, that there was a failure "to provide proper and appropriate warnings to product users". (Complaint, ¶ 1571(a) at 390 and (c) at 391). The allegation of product defect is supported by Gordon Damant, who points out

> [b]ecause of the extremely rapid manner in which non flame retardant polyurethane foam burns . . . flexible polyurethane foam in [his] opinion should not be used in any application where a known fire hazard exists, or where fire is of the slightest concern, and this warning should be given by the manufacturer upon sale. There should also be a warning that this foam should not be used exposed in any architectural application.

---

[6] The Defendant states that it "produces bulk polyurethane foam for sale is large buns or blocks". (See Affidavit of Margaret Hebner, ¶ 6).

(*Affidavit of Gordon Damant,* ¶ 10). The foam was indeed "defective in itself" and the Plaintiff asserts this defect was delivered intact from General Foam to American Foam to the owners of the Station nightclub.

III. The Duty Owed to the Plaintiff

Simply put, "[n]egligence is the breach of a duty, the existence of which is a question of law." *Banks v. Bowen's Landing Corp.*, 522 A.2d 1222, 1224 (R.I. 1987). When determining whether a defendant owes a duty of care to a plaintiff, there is no "clear-cut rule". Id. at 1225. There are, however, a number of factors the court will consider when making its determination including:

> (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of [the] connection between the defendant's conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach."

Carroll v. Yeaw, 2004 WL1259425 (R.I. 2004) citing *Banks v. Bowen's Landing Corp.,* supra. "The linchpin in determining the existence of any duty owed . . . [is] the foreseeability of the risk of injury . . ." *Splendorio v. Bilray Demolition Co.,* 682 A.2d 461, 466 (R.I.1996).

"'[D]uty is not an immutable fact of nature' "but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."" *Banks v. Bowen's Landing Corp.*, supra at 1226, quoting from *Ballard v. Uribe*, 41 Cal.3d 564, 573 n. 6, 715 P.2d 624, 628 n.6, 224 Cal.Rptr. 664, 669 n. 6 (1986). "The foreseeability of a *particular* kind of harm plays a very significant role in this calculus (citation omitted) but a court's task – in determining 'duty' – is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." Id. quoting from *Ballard v. Uribe*, supra.

On this question, the focus of inquiry should be on the risk created by the burning of the volatile foam used on the walls of the Station nightclub and the injuries that resulted from it, not upon who started the fire.[8] These risks include, as set out below, the foam's extreme flammability and propensity to ignite "very easily", its rapid burning rate, its high rate of heat release, and the production of toxic smoke, all of which the Plaintiff alleges were a cause of her injuries. (See *Affidavit of Gordon Damant*). The Rhode Island Supreme Court has spoken of "the essence of foreseeability" as "the natural and probable consequences of an act. One need only reasonably foresee that *an* injury may result from a dangerous condition on the premises. The particular kind of injury need not have been foreseen." *Hueston v. Narragansett Tennis Club, Inc.*, 502 A.2d 827, 830 (R.I. 1986).

Putting aside for the moment that the foam on the walls of the Station nightclub provided the initial (and primary) fuel source for the fire, and, the consideration of the principles of concurring proximate causes (discussed below), in the face of the Defendant's denials as to its role in this tragedy, some refocusing upon the factual bases for the allegations against the Defendant is appropriate. In his affidavit, Gordon Damant asserts that

---

[8] The Defendant asserts it "did not have a duty to prevent the fire" (Defendant's Memorandum at p. 14).

> [f]lexible polyurethane foam, without fire retardants is a highly combustible material that has been know for decades to be extremely flammable which ignites very easily – typically in one second or less from a small open-flame ignition source such as a match, and once ignited burns very rapidly, with great energy, and a high rate of heat release, liberating large quantities of smoke and toxic combustion products while burning. This combination of heat, smoke and toxic gases is incapacitating in a matter of seconds, and is often fatal.

(*Affidavit of Gordon Damant,* ¶ 11). Mr. Damant cautions that "flexible polyurethane foam . . . should not be used in any application where a known fire hazard exists, or *where fire is of the slightest concern*, and this warning should be given by the manufacturer upon sale. There should also be a warning that this foam should not be used exposed in any architectural application." (*emphasis added*) Id. at ¶ 10.

In a nightclub setting like the Station, there is a foreseeable risk of fire from a number of sources. Patrons come to a nightclub for the primary purpose of enjoyment that, depending upon the individual, can include listening to live music, dancing, and socializing with friends and acquaintances. However, this is frequently done in a crowded, poorly illuminated environment. Along with this comes alcohol consumption, and frequent cigarette smoking that requires use of lit matches or lighters. If a nightclub presents live music like the Station, high-powered amplifiers, musical instruments and related equipment requiring a substantial electrical power source are common. Inevitably, stage lighting is used as well, not only requiring additional power sources but generating significant heat as well. In the case of the Station, which would periodically present musical acts with a national reputation, the risk of fire is even greater as such performers, like Great White, may produce and present stage shows that are more elaborate, employing props including pyrotechnics. (See "*Band's pyrotechnics use varied on tour*", Providence Journal, March 3, 2003).

The foam product in question was used as a sound dampener. Nightclubs that present live music are characteristically loud and can, and do, create disturbance in the surrounding area. If adjacent to a residential area, as in the case of the Station, sound containment becomes more important. It is alleged that the owners of the nightclub purchased the foam in question from American Foam for this very purpose. (See *Exhibit 1*, and, "*Purchase of foam at club is traced*", Boston Globe, March 6, 2003). Because of the volatile and dangerous characteristics inherent in the foam used in the Station nightclub, it should have been accompanied by a warning that the foam "should not be used exposed in any architectural application." (See *Affidavit of Gordon Damant* generally). "The extreme inherent flammability dangers of non flame retardant polyurethane are well known in the polyurethane foam industry, including by Foamex Corporation and General Foam Corporation, and have been extensively documented." (*Affidavit of Gordon Damant,* ¶ 12). The Plaintiff claims there was never such a warning.

The deadliest features of the Defendant's product were fully evident and graphically depicted in a video taken by a local WPRI television cameraman as the fire began and rapidly gained frightening momentum in mere seconds. (See "*TV Station Captures Horror from the Inside*", Associated Press, February 21, 2003, "*Nation's media converge on town*", Providence Journal, February 22, 2003, and video excerpt - http://www.cbsnews.com/stories/2003/02/22/national/main541587.shtml).[9] It is the foam's deadly characteristics, as depicted on this videotape, as well as the failure to provide adequate warnings as to the proper uses to be made of the product, that

[9] Counsel for the Plaintiff will provide a copy of the WPRI videotape to the Court in its entirety at the Court's pleasure.

renders the foam unreasonably dangerous and defective. This rare piece of graphic evidence also clearly shows that which the Defendant denies; that the untreated foam, performing as its innate physical and chemical characteristics dictated, ignited immediately and spread virtually instantaneously, thereby being a primary proximate cause of the Plaintiff's injuries.

III. Proximate Cause of Injury to the Plaintiff

The dangerous and defective polyurethane foam that burned in the Station nightclub was a proximate cause of Plaintiff's injuries.[10] "It is well settled that in order to gain recovery in a negligence action, a plaintiff must establish * * * proximate causation between the conduct and the resulting injury, and the actual loss or damage." *English v. Green,* 787 A.2d 1146, 1151 (R.I. 2001) quoting *Jenard v. Halpin,* 567 A.2d 368, 370 (R.I.1989). "Proximate cause is established by showing that but for the negligence of the tortfeasor, injury to the plaintiff would not have occurred." Id. quoting *Skaling v. Aetna Insurance Co.,* 742 A.2d 282, 288 (R.I.1999).

Intervening and Concurrent Causes

The Plaintiff disputes any assertion there are other causes that sever the Defendant's responsibility for her injuries. It is "well settled that for an independent intervening cause to replace a defendant's original negligence as the proximate cause of an accident, the original negligent conduct must have become *totally inoperative* as a cause of the injury." (*emphasis added*), *Hueston v. Narragansett Tennis Club, Inc.*, 502 A.2d 827, 830 (R.I. 1986) citing *Roberts v. Kettelle*, 116 R.I. 283, 356 A.2d 207 (1976). "Ordinarily, the determination of proximate cause and, consequently, the existence of any superseding cause is a question of fact that should not be decided by summary judgment." *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461, 467 (R.I. 1996). The Plaintiff, resisting the efforts of the Defendant to end its involvement in this litigation, has presented "sufficient facts to satisfy the necessary elements of his [or her] negligence claim". Id. Consequently, the question of whether proximate cause exists is for the fact finder to resolve. *See DiQuinzio v. Panciera Lease Co.,* 641 A.2d 50, 54 (R.I.1994) citing *Rodrigues v. The Miriam Hospital,* 623 A.2d 456, 461 (R.I.1993). "It is only when the facts are undisputed and are susceptible of but one inference, that the question is one of law for the court . . ." *Schenck v. Roger Williams General Hospital,* 119 R.I. 510, 517, 382 A.2d 514, 518 (1977) quoting *Mayor & City Council v. Terio,* 147 Md. 330, 128 A. 353, 355 (1925).

---

[10] "[T]he determination as to whether a defendant has breached a duty, i.e., whether its conduct was reasonable or unreasonable under all the circumstances, is one of fact, and, therefore, generally cannot be resolved by summary judgment." *Travelers Insurance Co. v. Priority Business Forms, Inc.*, 11 F.Supp.2d 194 (D.R.I. 1998).

Moreover, it is "fundamental that there may be concurring proximate causes which contribute to a plaintiff's injury and that a defendant's negligence is not always rendered remote in the causal sense merely because a second cause intervenes." *Hueston v. Narragansett Tennis Club, Inc.*, 502 A.2d 827 (R.I. 1986); citing *S.M.S. Sales Co. v. New England Motor Freight, Inc.,* 115 R.I. 43, 47, 340 A.2d 125, 127 (1975); see also *Reek v. Lutz*, 90 R.I. 340, 158 A.2d 145 (1960); *Gillogly v. New England Transportation Co.*, 73 R.I. 456, 57 A.2d 411 (1948); and *Prue v. Goodrich Oil*

Co., 49 R.I. 120, 123, 140 A. 665 (1928).[11] "If the independent or intervening cause is reasonably foreseeable, the causal connection remains unbroken. *S.M.S. Sales Co. v. New England Motor Freight, Inc.* supra. at 47, citing *Aldcroft v. Fidelity & Cas. Co.*, 106 R.I. 311, 259 A.2d 408 (1969); and *Denisewich v. Pappas*, 97 R.I. 432, 198 A.2d 144 (1964).

The Plaintiff alleges the foam was a primary operative cause of her injury as its highly flammable characteristics led to the ignition of the fire. The rapid manner in which the foam burned led to an almost instantaneous escalation of the blaze leading to flash over, allowing the Plaintiff virtually no opportunity for safe exit from the nightclub. (See *Remy v. Michael D's Carpet Outlets*, where foam padding manufactured by General Foam Corporation ignited and "acted as an accelerant and caused the rapid spread of the fire into the all-consuming conflagration which destroyed the premises." 391 Pa.Super. 436, 443, 571 A.2d 446, 450 (1990). The emissions from the rapidly burning foam were physically damaging and debilitating (and for others, lethal) as it created, among other hazards, a toxic, oxygen-depleted environment that slowed reaction time to the danger at hand, impaired judgment and obliterated vision.

Pleading in the Alternative – Not an Admission

As permitted by Rule 8 of the Federal Rules of Civil Procedure, the Plaintiff has pleaded in the alternative, alleging a number of theories against several other defendants. The Defendant however, asserts these alternative theories are, in effect, admissions that should be accepted as true as part of the court's analysis of its motion.[12] For purposes of Rule 12(b)(6) analysis, rather than taking *only* the allegations against Foamex to be true, the Defendant instead urges the Court to assume for the purpose of this motion that *all* the allegations against *all defendants* are true and must be considered together. This argument is completely contrary to Rule 8(e)(2).

---

[11] The Rhode Island legislature has addressed the practical application of the concept of concurring proximate causes in R.I. General Laws 10-6 *et seq*. entitled *Contribution Among Joint Tortfeasors*, commonly referred to as the 'Joint Tortfeasor Act'.

Rule 8 provides the "starting point" for evaluating Plaintiff's argument on this issue. *Coleman v. Standard Life Insurance Company*, 228 F. Supp.2d 1116 (E. D. CA. 2003). In pertinent part, Rule 8 provides:

> A party may set forth two or more statements of a claim or defense *alternately or hypothetically,* either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has *regardless of consistency* and whether based on legal, equitable, or maritime grounds.

Fed.R.Civ.P. 8(e)(2) (emphasis added). "A pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case." *McCalden v. California Library Ass'n,* 955 F.2d 1214, 1219 (9th Cir.1990) (quoting *Molsbergen v. United States,* 757 F.2d 1016, 1019 (9th Cir.1985)); see also *Oki America v. Microtech Intern. Inc.,* 872 F.2d 312, 314 (9th Cir.1989) ("[O]ne of two inconsistent pleas cannot be used as evidence in the trial of the other because a contrary rule would place a litigant at his peril in exercising the liberal pleading ... provisions of the Federal Rules."); *In re Tamen,* 22 F.3d 199, 204 (9th Cir.1994). This is

[12] After generally listing allegations against other defendants, Foamex asserts "[t]he magnitude of these superseding causes are pleaded-and therefore conceded-by Plaintiffs . . ." (Defendant's Memorandum at p. 3). Then, in a section entitled "Plaintiffs' Allegations Compel Foamex's Dismissal" the Defendant details the allegations in Plaintiff's complaint over 3 pages (pp. 5-7) stating "Plaintiffs correctly blame a number of different individuals and entities for this tragic fire." Id. at p. 5.

consistent with the language of Rule 8 and "the general purpose of the Federal Rules," which is "to minimize technical obstacles to a determination of the controversy on its merits." *United States ex rel. Atkins v. Reiten,* 313 F.2d 673, 675 (9th Cir.1963).

The First Circuit adopted this position as well in *Rodriguez-Suris v. Montesinos.*123 F.3d 1 (1st. Cir. 1997).[13] The court in *Rodriguez-Suris* reinforced the point; "[e]specially at the early stages of litigation, a party's pleading will not be treated as an admission precluding another, inconsistent, pleading." Id. at 21. The Defendant's attempt to utilize the Plaintiff's alternative pleadings as support for its arguments on the issue of intervening causes is clearly prohibited and should be disregarded.

Intentional or Criminal Acts

The foreseeability test is the same for acts one would argue are 'criminal' in nature. See *Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436 (R.I. 1984). In *Welsh*, the Plaintiff brought suit against a security company for losses sustained as a result of several thefts of gold. The Plaintiff, a manufacturer of gold sunglass frames for the government, claimed the Defendant had negligently hired, trained and supervised a part-time employee who participated in the thefts while working as a security guard on Plaintiff's premises. The Defendant argued the trial

---

13 ``*See Gens v. Resolution Trust Corp.,* 112 F.3d 569, 573 & n. 4 (1st Cir.1997) (noting the relaxed standard of the Federal Rules that allows alternative pleadings); *Aetna Cas. Sur. Co. v. P & B Autobody,* 43 F.3d 1546, 1555 (1st Cir.1994) ("Because procedural law allows alternative contentions, parties to a civil action involving such an array of factual and legal theories as this case presents may be allowed to defer choice at least until late stages of proceedings in the trial court."); *McCalden v. California Library Ass'n,* 955 F.2d 1214 (9th Cir.1990) (holding that allegations should not be construed as an admission against inconsistent claims), *cert. denied,* 504 U.S. 957, 112 S.Ct. 2306, 119 L.Ed.2d 227 (1992); *Molsbergen v. United States,* 757 F.2d 1016, 1018-19 (9th Cir.) (same), *cert. dismissed,* 473 U.S. 934, 106 S.Ct. 30, 87 L.Ed.2d 706 (1985)." Id.

court erred when it submitted the issue of proximate cause to the jury claiming the security guard's actions constituted a "criminal intervening act" that "broke the chain of causation." Id. at 444. The R.I. Supreme Court rejected this argument, finding "it was . . . for the jury to determine what dangers, including criminal conduct, the plaintiff should have perceived and what precautions and safeguards it should have taken . . ." Id.

Although the within matter is before this Court on the basis of the Court's minimal diversity jurisdiction, and is thus governed by the substantive law of the State of Rhode Island, the decision of the United States Supreme Court in *Sheridan v. U.S.* speaks to the very same issue and illuminates the proper considerations in assessing whether a cause is truly supervening in nature. 487 U.S. 392, 108 S.Ct. 2449 (1988).

In *Sheridan*, the court was called upon to reconcile the application of the 'intentional tort exception' contained in the Federal Tort Claims Act with the facts of plaintiff's claim. The plaintiff was injured when an intoxicated off-duty serviceman randomly fired a rifle into a car the plaintiff occupied. The perpetrator had been found by three other naval corpsmen "lying face down in a drunken stupor on the concrete floor of a hospital building." Id. at 395. When the corpsmen attempted to take the intoxicated serviceman to the emergency room a struggle ensued. However, when they saw he had a bag containing a rifle the corpsmen fled and did nothing further either to subdue the perpetrator, or to report the incident. Later in the evening, the shooting of the plaintiff took place.

The Plaintiff filed a lawsuit against the United States alleging the government was negligent in allowing the serviceman, a naval medical aide, to leave Bethesda Naval Hospital with a loaded rifle. In reliance upon the 'intentional tort exception' to the

FTCA, the lower court dismissed the plaintiff's claim. The ruling was affirmed by the 4th Circuit and the plaintiff appealed. The Supreme Court reversed, stating that characterizing the perpetrator's actions "as an intentional assault rather than a negligent act is . . . quite irrelevant" and focused rather upon the actions of the three corpsmen, who did nothing to prevent the shooting, as the basis for liability, Id. at 403.

In a concurring opinion Mr. Justice Kennedy, took issue with the reasoning of the dissenters, stating "[t]he dissent's fundamental premise seems to be that any injury in which an intentional act is a substantial cause necessarily arises only from that intentional act. This contradicts the basic rule that the same injury can arise from more than one wrongful act:"[14]

> "Where voluntary acts of responsible human beings intervene between defendant's conduct and plaintiff's injury, the problem of foreseeability is the same and courts generally are guided by the same test. If the likelihood of the intervening act was one of the hazards that made defendant's conduct negligent--that is, if it was sufficiently foreseeable to have this effect-- then defendant will generally be liable for the consequences .... *So far as scope of duty ... is concerned, it should make no difference whether the intervening actor is negligent or intentional or criminal.*" 2 F. Harper & F. James, Law of Torts § 20.5, pp. 1143-1145 (1956) (footnotes omitted)." (*emphasis added*).

Id. at 405-6.

In *Independent School District No. 14 v. AMPRO Corporation*, foam landing mats used for high-jumping and pole-vaulting activities at a high school were intentionally set afire by two students intending to "make a little smoke". 361 N.W.2d 138 (MN. 1985). The court accepted the Plaintiff's argument that "[f]ires from various causes are not unexpected in school buildings or at athletic events." As an example, the court focused

[14] Mr. Justice Kennedy plainly stated it "is standard tort doctrine that a reasonably foreseeable injury can arise from multiple causes, each arising from a breach of a different duty and each imposing liability accordingly." Id. at 406.

upon the testimony of one student who said the area where the foam mats were stored was "a place where students would go to smoke cigarettes." The court found there was a jury question on the issue of the foam mat's burning propensities thereby making the product unreasonably dangerous for use and storage in and around a school.

Lastly, regarding the question of arson as a superseding cause, a number of jurisdictions have reached a result contrary to that urged by the Defendant. See *Salmon v. Wendell Terrace Owners Corp.*, 774 N.Y.S.2d 54, (2004) (The court found that arson was not a superseding cause of injury suffered in apartment building fire by the plaintiff. " . . . even if the fire was the result of arson, it cannot be said that the alleged criminal act was so extraordinary or so attenuated from the defendant's negligent conduct as to constitute a superseding cause sufficient to relieve the defendant of liability."); *Whitfield v. New York*, 657 N.Y.S.2d 757, (1997) (Arson fire in city owned building resulting in injury to plaintiff was held not to be a superceding cause); *B and D Associates, Inc. v. Russell*, 73 Conn.App. 66, 807 A.2d 1001 (2002) (The court found a jury question on the issue of arson as a superseding cause of damage to commercial building); *Britton v. Wooten*, 817 S.W.2d 443 (KY. 1991) (Summary judgment granted in favor of a tenant against a landlord for an apartment fire based upon arson as a superseding cause reversed.); *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157 (Ind.App. 2 Dist. 1988) (Arson held not to be superseding cause of landlord's negligence in failing to provide a second means of egress to tenant injured in fire due to inability to escape); *d'Hedouville v. Pioneer Hotel Company*, 552 F.2d 886, (9^{th} Cir. 1977) (The Ninth Circuit Court of Appeals acknowledged that the State of Arizona, in recent decisions, had come to reject the rule that the criminal act of third party was superseding cause as a matter of law in favor of applying general principles of foreseeability).

CONCLUSION

For the reasons set forth above, Plaintiff respectfully prays that Defendant's motion to dismiss be denied. To the extent that Defendant attempts to style its motion in the alternative as one for summary judgment, that, too, should be denied in light of the substantial issues of material fact already apparent at this early stage in the proceedings.

In a case of this complexity the primary engine of truth will be full discovery, conducted pursuant to this Court's rules and under its supervision. Should this Court be inclined to even entertain Defendant's motion at this point, Plaintiff would respectfully urge that, at a minimum, leave for discovery be granted before consideration be given to the dismissal of any of the serious claims brought by the Plaintiff.

Respectfully submitted,

Plaintiff MICHELLE SPENCE
By her Attorneys,

BREGGIA BOWEN & GRANDE
395 Smith Street, Providence, RI 02908
Telephone: (401) 831-1900
Facsimile: (401) 831-0129

STEPHEN E. BREGGIA, #2865

CERTIFICATION

I hereby certify that on the 8th day of July 2004 a true copy of the within was mailed to:

Thomas C. Angelone, Esq.
HODOSH, SPINELLA & ANGELONE, P.C.
One Turks Head Place, Suite 1050
Providence, RI 02903

Stephen Born, Esq.
Amy Scheeley, Esq.
LAW OFFICES OF DONALD E. GREEN
2235 Washington Street
Roxbury, MA 02119

Joseph Cavanagh, Jr., Esq.
Kristen E. Rodgers, Esq.
BLISH & CAVANAGH
30 Exchange Terrace
Providence, RI 02903

Edward M. Crane, Esq.
Deborah Solmor, Esq.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
333 West Wacker Drive
Chicago, IL 60606

Brian Cunha, Esq.
Karen A. Alegria, Esq.
BRIAN CUNHA & ASSOCIATES
904 Broadway
East Providence, RI 02914

Anthony F. DeMarco, Esq.
Mark Reynolds, Esq.
REYNOLDS, DEMARCO & BOLAND, LTD
170 Westminster Street, Suite 200
Providence, RI 02903

Gerald C. DeMaria, Esq.
James A. Ruggieri, Esq.
HIGGINS CAVANAUGH & COONEY
123 Dyer Street
Providence, RI 02903

Marc DeSisto, Esq.
DE SISTO LAW
211 Angell Street
P.O. Box 2563
Providence, RI 02906-2563

Christopher C. Fallon, Esq.
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103-3508

Joyce A. Faraone, Esq.
400 Reservoir Avenue, Suite 3G
Providence, RI 02907

Carl A. Henlein, Esq.
John R. Crockett, III, Esq.
Susan S. Wettle, Esq.
FROST BROWN TODD
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363

Edward T. Hinckey, Esq.
Curtis R. Diedrich, Esq.
SLOANE & WALSH
3 Center Plaza
Boston, MA 02108

James Howe, Esq.
215 Broadway
Providence, RI 02903

Patrick T. Jones, Esq.
COOLEY MANION JONES, LLP
21 Custom House Street
Boston, MA 02110

Fred A. Kelly, Jr., Esq.
Randall L. Souza, Esq.
NIXON PEABODY, LLP
One Citizens Plaza, Suite 700
Providence, RI 02903

Donna M. Lamontagne, Esq.
ZIZIK, POWERS, O'CONNELL, SPAULDING, LAMONTAGNE, P.C.
40 Westminster Street, Suite 201
Providence, RI 02903

Ronald Langlois, Esq.
Lauren D. Wilkins, Esq.
SMITH & BRINK
One State Street, Suite 400
Providence, RI 02908

Stefanie Larivee-DiMaio, Esq.
GRILLI & DIMAIO
215 Broadway
Providence, RI 02903

Faith A. LaSalle, Esq.
LAW OFFICES OF FAITH A. LASALLE
One Turks Head Place
76 Westminster Street, Suite 1010
Providence, RI 02903

James R. Lee, Esq.
Department of the Attorney General
150 South Main Street
Providence, RI 02903

Eva Marie Mancuso, Esq.
HAMEL, WAXLER, ALLEN & COLLINS
387 Atwells Avenue
Providence, RI 02909

Mark S. Mandell, Esq.
MANDELL, SCHWARTZ & BOISCLAIR
One Park Row
Providence, RI 02903

W. Thomas McGough, Jr., Esq.
James J. Restivo, Jr., Esq.
435 Sixth Avenue
Pittsburgh, PA 15219

Matthew E. Medeiros, Esq.
LITTLE, BULMAN, MEDEIROS & WHITNEY
72 Pine Street
Providence, RI 02903

Howard Merten, Esq.
Eric M. Sommers, Esq.
VETTER & WHITE
20 Washington Place
Providence, RI 02903

Donald A. Migliori, Esq.
MOTLEY RICE
321 South Main Street, Suite 402
Providence, RI 02903

Steven A. Minicucci, Esq.
William A. Filippo, Esq.
CALVINO LAW ASSOCIATES
373 Elmwood Avenue
Providence, RI 02907

Ralph J. Monaco, Esq.
CONWAY & LONDREGAN
38 Huntington Street
P.O. Box 1351
New London, CT 06320

James T. Murphy, Esq.
Kelly N. Michels, Esq.
HANSON CURRAN, LLP
146 Westminster Street
Providence, RI 02903

J. Renn Olenn, Esq.
OLENN & PENZA
530 Greenwich Avenue
Warwick, RI 02886

Charles N. Redihan, Jr., Esq.
KIERNAN, PLUNKETT & REDIHAN
91 Friendship Street
Providence, RI 02903

Ronald J. Resmini, Esq.
Ronald J. Creamer, Esq.
LAW OFFICES OF RONALD J. RESMINI
155 South Main Street, Suite 400
Providence, RI 02903

Christopher L. Russo, Esq.
KIRSHENBAUM & KIRSHENBAUM
888 Reservoir Avenue
Cranston, RI 02910

Mark D. Tourgee, Esq.
Timothy A. Williamson, Esq.
INMAN TOURGEE & WILLIAMSON
1193 Tiogue Avenue
Coventry, RI 02816

Scott J. Tucker, Esq.
TUCKER, HEIFETZ & SALTZMAN, LLP
Three School Street
Boston, MA 02108

Oleg Nikolyszyn, Esq.
155 South Main Street, Suite 303
Providence, RI 02903

Mark T. Nugent, Esq.
Paul Sullivan, Esq.
MORRISON, MAHONEY & MILLER
One Providence Washington
Providence, RI 02903

Robert I Reardon, Jr., Esq.
Robert I. Rimmer, Esq.
THE REARDON LAW FIRM, P.C.
Plaza 160 Hempstead Street
New London, CT 06320

James H. Reilly III, Esq.
KELLY, KELLEHER, REILLY
& SIMPSON
146 Westminster Street
Providence, RI 02903

William P. Robinson, III, Esq.
Stephen M. Prignano, Esq.
Stephen MacGillivray, Esq.
EDWARDS & ANGELL LLP
One Financial Plaza, Ste. 2700
Providence, RI 02903

Michael A. St. Pierre, Esq.
REVENS, REVENS & ST. PIERRE P.C.
946 Centerville Road
Warwick, RI 02886

Andrew Trevelise, Esq.
REED SMITH LLP
2500 One Liberty Place
Philadelphia, PA 19103-7301

Max Wistow, Esq.
WISTOW & BARYLICK
61 Weybosset Street
Providence, RI 02903

Cynthia A. Jacob

Exhibit 1

AFFIDAVIT

Your affiant upon oath states that he has reason to believe and does believe that grounds for such warrant exist and states the following facts on which such belief is founded on the following affidavit.

On Thursday, February 19, 2003 at approximately 23:07 hours, police, rescue and fire apparatus responded to the Night Club "Station" located at 211 Cowesett Avenue, West Warwick where a fire broke out inside the establishment as a result of pyro-techniques being used during a concert by the Band Great White. A Channel Twelve cameraman was in attendance of said concert and videoed the incident from both inside and outside. To date 96 deaths resulted in this fire. Numerous patrons were critically injured and hospitalized.

The Station is a live band venue where nationally known bands have played. It consisted of a bar located to the left and a second bar located to the rear. A stage was located to the right upon entering the front entrance. The business is owned and operated by two brothers, Jeffrey Derderian and Michael Derderian and have operated under the corporate name of Derco LLC doing business as The Station.

According to initial interviews, the nationally known band, "Great White", was playing and within minutes of their taking the stage the band utilized pyro-techniques consisting of sparklers on both sides and center of the stage. The stage area was covered with an egg crate foam sound absorbing material which covered the walls and ceiling. As depicted in the video tape, shortly after the detonation of the pyro-techniques devices, two areas of the egg crate material located at the rear stage area caught fire. It is apparent that this material was not fire retardant but was highly combustible which caused the fire to spread rapidly. According to the State Fire Marshall's Office the use of pyro-techniques require the issuance of a permit as the sparkler is classified as fireworks. The State Fire Marshall's Office reported that no permits were issued for the event held at the Station on February 20, 2003. A check with West Warwick authorities also indicated that no permit for the pyrotechnic display was obtained.

During the subsequent investigation, Band Tour Manager, Daniel Biechele was interviewed by West Warwick Police Detective Gary Appolonia. Daniel Biechele told Detective Appolonia as well as the media that he set up the pyro-techniques used during the concert. It was determined that the use of the pyro-techniques devices were the cause of the fire. Daniel Biechele told the police as well as the media that the owners of the Station were informed that pyro-techniques were going to be used during the concert. Michael and Jeffrey Derderian both adamantly dispute having knowledge that said pyro-techniques were going to be used.

On 2-23-02 RISP Det. Sgt. Brian Casilli along with AAG Randall White and ATF Case Agent Michael Payne interviewed Barry Warner of 5 Kulas Road, West Warwick, Rhode Island. Barry informed the investigators that his residence is in close proximity to the Station and as such, has suffered, for a prolonged period of time, from the noise disturbance resulting from The Station operating as a live band venue. Barry Warner informed the investigators that shortly after of the purchase of the business by the Derderian brothers, a period he estimated to have been approximately 2 ½ years ago, he was approached by one of the Derderian brothers who was making a gesture to ease Barry Warner's concerns by offering to purchase an air conditioner for the Werner's.

Barry Warner indicated to investigators that he had subsequent conversations with one or both of the Derderian brothers and that it was during this conversation that he informed the Derderian's of the fact that he (Warner) is employed by American Foam Corporation, 61 John St., Johnston, Rhode Island, in the capacity of a salesperson. Warner informed the investigators that he to[illegible] ...e . [illegible]derians about a foam that is use[illegible] [illegible] pa[illegible]ging that is sold by his place of employment. Warner informed the Derderians that they could purchase the foam and use it as a form of sound absorbing material.

Barry Warner informed the investigators that he began working for American Foam Corporation back in the 1970's and continued to work at that location up until approximately six (6) or seven (7) months ago. Warner stated that he was employed in the capacity as salesperson and that he worked primarily on salary but did receive a small commission from the sales he generated. Warner stated that he could not recall if he generated the sale involving the Derderian Brothers either individually or corporately but stated that he was certain that the Derderians did purchase approximately Four Hundred ($400.00) to Six Hundred ($600.00) dollars worth of the foam. Warner informed the investigators that shortly thereafter, he was invited by the Derderian brothers to visist the venue and observe the foam in place, as they have made attempts to ease the concerns of Mr. Warwner.

Therefore, your affiant believes and does believe that probable cause does exist to search and seize herein property; to wit: American Foam Corporation sales records, sales receipts, sales commissions reports and/or disbursements, shipping records, delivery schedules, delivery receipts relative to the purchase of a foam product from American Foam Corporation to either Michael Derderian, Jeffrey Derderian, individually or jointly, or Derco LLC DBA The Station. In addition, your affiant is knowledgeable of the Federal requirement that all manufacturers must prepare and maintain a Material Safety Data Sheet (MSDS) on all products manufactured and all distributors of said products must maintain said sheets on file. Your affiant seeks these MSDS and any other product specification sheets for all foam products sold by American Foam Corporation within the past four (4) years. Documents should include, but not be limited to, any and all related purchase requisitions, specifications for goods, purchase orders, invoices, receiving reports, copies of checks or other such documents used to remit payment for goods, any applications for credit, and any and all correspondence between parties.

2-24-03
Date

[signature]
Affiant

In Warwick this 24[rd] day of February 2003, before me personally Detective Roland J. Coutu and made oath to the truth of the foregoing

[signature]
Judge of the District Court

Exhibit 2

RETURN OF SERVICE

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

...., Sc.

At American Foam Corporation, 61 John Street, Johnston, Rhode Island, February 24, A.D. 2003, pursuant to the within warrant I have made search during the daytime — during the nighttime — as commanded and submit herewith a written inventory of property taken:

Nothing was seized as the warrant was NOT executed. Rather a consent to search form was signed and material was provided by the company voluntarily. Items that were voluntarily turned over on 2-24-03 include:

1.) Invoice #616171 dated 6-27-00 indicating the purchase of foam by "The Station".
2.) Polyether Foam Grade: 36000XXX Product Data Sheet prepared by General Foam dated 7-7-95.
3.) Material Safety Data Sheets, prepared by American Foam Corporation for product "Flexible Polyether Polyurethane Foam" consisting of three (3) pages and a cover letter.

Additional items voluntarily turned over to me on 2-27-03 include:

4.) Additional copy of the Polyether Foam Grade: 36000XXX Product Data Sheet prepared by General Foam dated 7-7-95.
5.) Material Safety Data Sheets, prepared by General Foam for product "Flexible Polurethane Foam" dated 1/97 consisting of eight (8) pages.
6.) Letter to Barry Warner dated October 29, 2002 regarding settlement of commission.
7.) Fax Memo dated 7-10-02 to Barry Warner with documents regarding Conversion Rights of life insurance police.
8.) Fax Memo dated 6-27-02 to Blue Cross regarding termination of benefits.
9.) Fax Memo dated 6-27-02 to Fleet -VISA Card regarding termination.
10.) Letter dated 6-27-02 to Barry Warner regarding employment termination.
11.) Correspondence from Blish & Cavanagh Attorneys at Law regarding employment contract between Barry Warner and American Foam Corporation.
12.) Direct Deposit authorization for Barry Warner.
13.) Copy of Credit Cards that had been issued to Barry Warner by American Form Corporation.
14.) Two (2) Beneficiary Designation forms.
15.) W-4 Employee's Withhold Allowance Certificate.
16.) Application of Employment completed by Barry Warner dated 9-27-76.
17.) Resume of Barry Warner.
18.) Letter to Mr. Dermanouelian (President American Foam Corp.) From Barry Warner regarding the recent hiring of Barry Warner by american Foam Corp.
19.) Employment Eligibility Verification for Barry Warner.
20.) Copy of RI License for Barry Warner.

I have also summoned named in said Complaint, as commanded to appear before the Division of the District Court in at 9:30 o'clock in the forenoon, on A.D..

I have also given to (No Person) the person from whom --from whose premises said property was taken -- a copy of the within warrant -- I have left a copy of the within warrant at -- on the place from which said property was taken -- I did not find the person from whose premises said property was taken but left a copy of said warrant at -- on the place from which the property was taken.

Authorized Officer